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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 DAVID LITWIN,

12 Defendant.
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Case No. 2:11-cr-00347-KJD-CWH

ORDER

14 Presently before the Court is Defendant's Motion for Bail Pending Appeal (#612). Plaintiff
15 filed a response (#624) to which Defendant replied (#628).

16 **I. Background**

17 On March 23, 2017, a jury found Defendant David Litwin ("Defendant") guilty of multiple
18 felony counts. On September 26, 2017, Defendant was sentenced to 240 months of imprisonment.
19 On October 10, 2017, Defendant filed a Notice of Appeal. Defendant claims he is entitled to bail
20 pending appeal pursuant to Title 18 U.S.C. §§ 3143(b) and 3142(g).

21 **II. Legal Standard**

22 **A. 18 U.S.C. § 3143(b) Requirements to Rebut Presumption of Detention**

23 A defendant may be released pending appeal only where the court finds by clear and
24 convincing evidence that (1) "the person is not likely to flee or pose a danger to the safety of any
25 other person or the community if released," and (2) "that the appeal is not for the purpose of delay
26 and raises a substantial question of law or fact likely to result in" reversal, a new trial, a sentence that

1 does not include a term of imprisonment, or a reduced sentence. 18 U.S.C. § 3143(b).

2 The factors the court considers when making the determination of whether a person is
3 “likely to flee or pose a danger to the safety” of the community are:

4 (1) the nature and circumstances of the offense charged, including whether the offense
5 is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or
6 involves a minor victim or a controlled substance, firearm, explosive, or destructive
7 device; (2) the weight of the evidence against the person; (3) the history of the person,
8 including [] the person’s character, physical and mental condition, family ties,
employment, financial resources, length of residency in the community, community ties,
past conduct, history relating to drug or alcohol abuse, criminal history, and record
concerning appearance at court proceedings . . . ; and (4) the nature and seriousness of
the danger to any person or the community that would be posed by the person’s release.

9 18 U.S.C. § 3142(g). A substantial question is one that is “fairly doubtful.” U.S. v. Handy, 761 F.2d
10 1279, 1283 (9th Cir. 1985). It must be a question “of more substance than would be necessary to a
11 finding that it was not frivolous” and is “debatable among jurists of reason.” Id. at 1282-83. Further,
12 “the burden of establishing these factors is on the convicted defendant.” U.S. v. Giancola, 754 F.2d
13 898, 901 (11th Cir. 1985).

14 B. Drug Offense Requires Additional “Exceptional Reasons” to Merit Release

15 Additionally, defendants convicted of drug offenses that impose maximum terms of
16 imprisonment of ten years or more must also show “exceptional reasons” to justify release pending
17 appeal. 18 U.S.C. § 3145(c). Examples of factors the court considers in determining whether
18 exceptional reasons exist include: (1) whether Defendant’s crime was an aberration; (2) whether
19 Defendant contributed significantly to society; (3) whether the nature of Defendant’s crime is
20 sufficiently dissimilar to others in the same category of crimes identified by the statute; (4) the length
21 of Defendant’s sentence (often a proxy for the seriousness of the crime committed); (5) whether there
22 were circumstances that would “render the hardships of prison unusually harsh for a particular
23 defendant;” (6) the benefit of an “uninterrupted course of treatment;” and (7) the effect of
24 incarceration on Defendant’s physical or mental health based on his characteristics. U.S. v. Garcia,
25 340 F.3d 1013, 1019-20 (9th Cir. 2003). These factors are “by no means exclusive,” and “the district

1 court's familiarity with the full record will enable it, when necessary, to undertake a searching and
2 informed evaluation of all the circumstances of the case, a process that an appellate court would
3 ordinarily be unable to undertake until after the appeal is completed." Id. at 1021.

4 **III. Analysis**

5 **A. Flight Risk**

6 Defendant argues he is not a flight risk because he complied with his pre-trial release, has no
7 prior criminal history, and has no plans to engage in further criminal activity. First, compliance with
8 pre-trial release is mandatory, not exceptional. Further, Defendant concedes that the current situation
9 is different than pre-trial detention; prior to trial, Defendant had not yet been convicted, and had not
10 yet received a twenty-year sentence.

11 Next, that Defendant has no previous criminal history is also not clear and convincing
12 evidence that he would not be a flight risk or danger to society. As the Government points out,
13 "[M]any Defendants convicted of serious offenses . . . have no documented criminal history. If that
14 alone were sufficient to release individuals convicted of those offenses, then all Defendants
15 convicted of similar offenses could get out of custody pending appeal. That is contrary to the
16 Congress's intent when [sic] it enacted 18 U.S.C. § 3143(b)(1)." (#624, at 5).

17 Additionally, it is of note that Defendant previously lived in Mexico for several years. He
18 attended a four-year medical training program there, followed by a two-year internship. Defendant
19 claims he "has no family or friends or acquaintances" in the Mexican community where he
20 previously lived. However, Defendant maintained a residence there for at least six years and speaks
21 the Spanish language.¹ As such, the Court would be remiss not to take into consideration that these
22 facts create a unique connection, temptation, and opportunity for Defendant to flee if released
23 pending appeal.

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25 ¹ Defendant's wife, when testifying at his sentencing, stated Defendant interpreted from Spanish to English and
26 English to Spanish for non-English speaking patients.

1 Last, in response to the Government’s argument that if Defendant is released, there is nothing
2 to prevent him from continuing to engage in criminal activity, Defendant’s attorney states, “I am
3 confident in saying that [Defendant] would not ever knowingly work in such a setting again. . . . [N]o
4 doctor would ever hire a medical assistant that had a conviction for distribution of controlled
5 substances.” (#628, at 4). That Defendant may not be a desirable hire by doctors seeking to commit
6 criminal activity does not speak to Defendant’s own proclivity to seek out or not seek out criminal
7 opportunity. Defendant was convicted of a serious offense, and taking into consideration all factors
8 presently before it, the Court determines Defendant has not met his burden to prove that he is not
9 likely to be a flight risk nor a danger to society.

10 B. Substantial Question

11 Defendant fails to meet his burden to show by clear and convincing evidence that he will
12 raise substantial questions of fact or law on appeal. Defendant claims that he will be raising the same
13 substantial issues that Dr. Henri Wetselaar raised on his appeal, and that because the Ninth Circuit
14 granted Dr. Wetselaar bail pending appeal, “[t]he same determination applies to [Defendant].” (#628,
15 at 3). However, as the Government points out, Defendant may not simply bootstrap his motion to the
16 Ninth Circuit’s ruling on Dr. Wetselaar’s motion without explaining how or what would give rise to
17 substantial questions of fact or law meriting release for his case; he must meet the burden of proof
18 himself.

19 Defendant states he will be:

20 appealing multiple Constitutional issues . . . includ[ing] but not limited to: the
21 dismissal of a juror in violation of his due process rights; the failure of the
22 government to turn over impeachment evidence until the final day of trial in
23 violation of this right to a fair trial; the inclusion of evidence after the
Government argued that the motion in limine requesting its exclusion was
‘moot;’ the Government failing to turn over Brady evidence; among other issues.
These are the same issues that Dr. Wetselaar raised.

24 (#628, at 2). However, Defendant does not state why these issues are debatable or non-frivolous, nor
25 does he state why they would be likely to result in reversal or a new trial, as is required. Thus, the
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1 Court determines Defendant has not met his burden to prove that he will raise substantial questions
2 of law or fact on appeal.

3 C. Exceptional Circumstances

4 Regardless of whether Defendant meets the above two prongs, he does not show any
5 exceptional reasons exist that would merit his release. On this point, Defendant's case is starkly
6 distinguishable from Dr. Wetselaar's case. Dr. Wetselaar's proffered exceptional reasons were his
7 advanced age and health conditions. Defendant does not share the same age or ailments that affect
8 Dr. Wetselaar, and "[h]ardships that commonly result from imprisonment" do not meet the
9 exceptional circumstances standard. Id. at 1022.

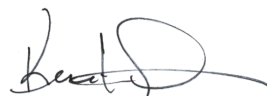
10 Further, Defendant claims this conviction "is outside the heartland of cases that were
11 envisioned in the Mandatory Detention Act of 1990" because "[t]hose cases were concerned with the
12 standard violent and drug-related offenses." (#628, at 6). However, Defendant does not contest the
13 jury's determination that he is guilty of a drug-related offense. (#628, at 3). The Mandatory Detention
14 Act's applicability does not distinguish between the types of drugs that were involved in the
15 qualifying, committed offense.

16 Thus, the Court, using its familiarity with the full record and undertaking an informed
17 evaluation of all the circumstances of this case, determines Defendant has not met his burden to
18 show there are exceptional reasons that merit his release pending appeal.

19 IV. Conclusion

20 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Bail Pending Appeal
21 (#612) is **DENIED**.

22 Dated this 17th day of January, 2018.

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25 Kent J. Dawson
26 United States District Judge